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Legal Protection of Intangible Cultural Heritage. The Concept of the Safeguarding of Expressions of Folklore

Abstract: The complexity of forms and structures of traditional heritage makes it difficult to create effective tools of legal protection on different levels: national, regional and international. From the beginning of the theoretical concept of safeguarding all aspects of heritage, the question arises whether such protection is needed and what kind of legal instruments and measures would be appropriate. At the international level, the foremost initiative is the WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions and UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, which not only offers the most sophisticated legal definition of intangible cultural heritage and folklore expressions, but also creates a listing mechanism aimed at drawing attention to intangible culture and the need for its safeguarding. Such an analysis would help to answer the questions whether legal protection is required and would be sufficient; and what, if any, are the appropriate analogies in existing law; and whether a *sui generis* scheme should be developed.

Key words: intangible cultural heritage, folklore, UNESCO, WIPO, international law, protection of traditional culture

The category of "creativity" has evolved over time as an intercultural construct along with the development of humanistic, social and legal thought.[1] Presently, all forms of intellectual and artistic activity are interpreted as the basis of

[1] The publication is based on the article: T. Konach, "Problematyka prawnej ochrony dziedzictwa niematerialnego na przykładzie przejawów folkloru," *Zarządzanie w Kulturze* 2014, Vol. 15, No. 1, pp. 29–38.

a particular society's spiritual development. The specific character of creativity manifests itself in the ease of its functioning abroad and rising above cultural, social and political barriers. Technological developments have ensured the possibility of use and registration of all forms of cultural resources around the world, including traditional forms of heritage and folklore. The influence of the globalization dynamics, new means of information and communication technology as well as the expansion of the Internet assume the necessity of creating juridical institutions that ensure effective universal protection.

Folklore is an example of the mutual penetration of elements of tangible and intangible heritage which construct cultural codes for a given society. These elements operate together and are created and sustained by individuals as common cultural resources of a particular society. It is obvious that intangible heritage cannot function apart from tangible heritage. It is necessary, however, to be aware of the specific character of both forms: as much as tangible heritage fundamentally refers to an existing or historical cultural context, intangible cultural heritage is realized by means of constant evolution. In association with the changing and dynamic character of intangible heritage, the question of its protection assumes the creation of a completely different system of legal instruments. In addition, legal regulations and instruments also refer to the problem of knowledge and traditional culture commercialization, or, if authorities representing a given society grant permission for the presence of folklore, create appropriate means of access for third parties. These norms, however, cannot lead to a decrease in national and societal economic growth.

The feeling of being situated in a particular culture has an influence on attitudes of responsibility and social rooting. It also shapes attitudes of respect for tangible and intangible forms as a part of historical consciousness and a way to understand the more recent means of artistic expression.[2] Acknowledging and recognizing one's own cultural heritage can encourage an open attitude towards the heritage of other nations and societies. These factors shape attitudes of tolerance and acceptance. This form of co-operation ensures respect for the diversity and equality of certain cultural property representatives of specific societies, nations and regions of the world.

At present, the discussion about the protection of intangible heritage is not concerned with the question of its recognition, as much as it is with separating appropriate legal instruments for preserving and promoting elements of intangible heritage. It is worth mentioning that the source of this protection, both in the case of objects of intellectual property in tangible form as well as

[2] S. Ratajski, speech given at the Public Debate Forum „Bogactwo kulturowe Polski – identyfikacja dziedzictwa niematerialnego" at the Chancellery of the President of the Republic of Poland in Warsaw, 2011.

knowledge and traditional art is both the heritage of the Enlightenment,[3] and the economic approach established in the regulations of the United States Constitution of 1787.[4] This document presents the famous *Patent and Copyright Clause* which constitutes that these rights intend to promote the development of science and art. The United States Constitution of 1787 also defines that the author should be treated in a similar way to the creators of tangible goods.

The next significant event for the problem of the intellectual property protection was the emergence of various means and tools of communication. Currently, traditional art is faced with threats posed by its mass production for the needs of the tourism industry, which not only reproduces cultural heritage in an inappropriate context, but also of significantly inferior quality. Mass production not only diminishes the value of traditional work, but also violates its nature. Therefore, they constitute a cultural and psychological threat for the identity and continuation of groups, societies and nations.[5] Literature on the subject emphasizes that the moment traditional forms of expression are applied in mass production was significant for the process of perceiving cultural heritage as a whole, not only as recorded in the tangible form, but also its intangible elements. It has an equal impact on preserving the continuity of cultural identity of societies. The attempts of appropriating and commercializing elements of beliefs and rites have led to a growing resistance and desire for granting legal protection to the elements of traditional intangible culture.[6]

The oldest act of international law associated with intellectual property is the Berne Convention for the Protection of Literary and Artistic Works of 1886.[7] The first text of the Convention did not make references to folk art. It was only in the revised text accepted at the conference in Stockholm

[3] The statement about the need for distinguishing and regulating the question of intellectual property in continental Europe was propagated by the Encyclopaedists, and in particular D. Diderot and Voltaire. In 1777, P.A. Caron de Beaumarchais established the first association of authors in France in order to promote the rights of authors associated with the use of literary and artistic work by others (the organization still exists today as Société des auteurs et compositeurs dramatiques – SACD).

[4] R.M. Hilty, "Rationales for Legal Protection of Intangible Goods and Cultural Heritage," *International Review of Intellectual Property and Competition Law* 2009, Vol. 40 (8), pp. 883–911.

[5] P. Kuruk, "Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions between Individual and Communal Rights in Africa and the United States," *American University Law Review* 1999, Vol. 48, pp. 769–852.

[6] R.M. Hilty, *op. cit.*, p. 885.

[7] The Berne Convention on Protection of Literary and Artistic Work (1886); S. Ricketson, J.C. Ginsburg, *International Copyright and Neighbouring Rights, The Berne Convention and Beyond*, Oxford–New York 2006, pp. 267, 274.

in 1967 that a resolution was added,[8] which enabled expressions of folklore to be acknowledged as an object of conventional protection.[9] On the other hand, the Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations[10] assumes direct protection, because *performances* of spoken, instrumental, vocal and dance forms of traditional culture can be protected even if they are not expressions of folklore themselves.[11]

The Protection of Folklore in Activities of the World Intellectual Property Organization

The initial discussions concerning granting legal protection to intangible forms of cultural heritage and traditional knowledge began over forty years ago. They primarily referred to questions of recognizing the need for folklore to be protected. These reflections were partially associated with the process of decolonization of Africa in the 20th century and with the quest for cultural identity on the part of newly formed states, and thus historical and political continuity.

The issue of protecting folklore was addressed for the first time during an international forum in 1973. Representatives of Bolivia proposed a project of accepting an additional protocol to the Universal Copyright Convention,[12] which would extend the subject of protection to also include folklore. The direct effect of this initiative was the creation of the Tunis Model Law on Copyright for The Developing Countries in 1976.[13] This document came into

[8] Article 15 (4) (a) and (b).

[9] The regulations of the Convention introduced the requirement for signatory states to create an authority responsible for collective execution and management of laws in the case of work of unknown authors and transferring information about these institutions to the World Intellectual Property Organization. However, the question if folklore can constitute a protected "work" in accordance with the Convention is controversial, all the more that it always cites the rights of communities and not individual rights.

[10] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961).

[11] In accordance with the resolutions of Article 3(a) of the Rome Convention, performers are acknowledged as "actors, singers, musicians, dancers and other people, who perform, sing, reproduce, recite, play perform works of literature or art in other forms." However, casuistic enumeration of "performers" does not ensure explicit protection of performers of folk art. Moreover, expressions of folklore do not fulfill the conventional condition of "literary and artistic works".

[12] The Universal Copyright Convention revised in Paris on 24 July 1971.

[13] Tunis Model Law on Copyright for Developing Countries (1976), http://portal.unesco.org/culture/en/files/31318/11866635053tunis_model_law_en.web.pdf/tunis_model_law_en-web.pdf [accessed on: 10 September 2014].

being as a result of the co-operation between UNESCO and the World Intellectual Property Organization. The next step in striving for legal protection of intangible culture was a publication issued in 1982 named the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions.[14] They were accepted a year later at a joint session of the Executive Committee of the Bern Convention and Intergovernmental Copyright Committee in Geneva. The committees deemed that the proposal of the World Intellectual Property Organization's model provisions is the first step in creating an international system of protection *sui generis*. The Convention's project for protecting expressions of folklore against illegal exploitation and other harmful activities was also proposed on the basis of this act. Nevertheless, the Convention was never accepted due to the objections made by the developed countries.[15]

The Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions does not define folklore. However, the document, introduces the category of "expressions of folklore".[16] Expressions of folklore are all forms of artistic expressions containing characteristic elements of traditional culture, developed and cultivated by a given community or units belonging to a particular community.[17] This definition also embraces more individualized forms of folklore expressions, because the generally recognized category of "impersonal" character of folklore does not always reflect the reality of the development of traditional culture.[18] The model provisions use the terms "expressions of folklore" and "traditional creativity", but they do not apply the term "work," which is

[14] Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1982), http://www.wipo.int/tk/en/documents/pdf/1982-folklore-model- provisions.pdf.

[15] J. Blake, "On Developing a New International Convention for Safeguarding Intangible Cultural Heritage," *Art Antiquity and Law* 2003, Vol. 8 (4), p. 384.

[16] The model provisions also contain an enumeration of protected expressions of folklore (Section 2). They are divided into the following categories:

- *verbal expressions*, such as folk tales, folk poetry and riddles;
- *musical expressions*, such as folk songs and instrumental music;
- *expressions by action*, such as folk dances, plays and artistic forms or rituals;
- *tangible expressions,* such as (a) productions of folk art (...), (b) musical instruments, (c) architectural forms.

In reference to copyright regulations, there is no requirement of recording these expressions in material form.

[17] According to the regulations of the Model Provisions only "artistic" expressions of folklore are subject to protection. Aside from the regulations of the Provisions examples of elements of traditional belief remain (e.g. folk cosmogony) and customs and other forms of traditional culture of applied nature. Introducing the "artistic" requirement is considered in the widest sense possible while referring to all expressions of artistry in folk creativity.

[18] For example: particular performances of songs, new performance techniques, etc.

appropriate for copyright regulations. This endeavour stresses that the model provisions considered are *sui generis* law, and not, therefore, regulations of intellectual property laws.

The regulations of the Model Provisions accept two fundamental ways of protecting the expressions of folklore: protection against illicit exploitation and other prejudicial actions. "Illicit exploitation" could be understood in two ways: by using expressions of folklore for material use and using expressions of folklore in a manner exceeding its traditional or customary cultural context. "Traditional context" means using expressions of folklore in an appropriate manner for necessary rituals. "Customary context" refers to daily communal practices. This context can change dramatically in a way that contradicts traditional context. Cases of publication, reproduction, distribution of expressions of folklore,[19] public performances and wireless distribution of "public communication" are all subject to protection.[20] The model provisions provide every member of the community with free access to expressions of folklore and the opportunity to utilize them also for commercial purposes. Such use of folklore is permitted in the case of educational and academic projects.[21]

"Other prejudicial actions" comprise of four forms of offences, which are subject to criminal sanctions:

- the requirement to place an *appellation of origin*, that is a registered mark of origin;[22]
- unauthorized use beyond the boundaries of a particular tradition and customs or use that is contradictory with traditional manners of use;
- incorrect attribution of expressions of folklore;
- actions deforming or modifying expressions of folklore that create a direct threat for the cultural identity of a community.

The model provisions do not refer to the category of "authorship." The terms "competent authority" or "community concerned" are used for indicating a community, whose rights are threatened. Both existing institutions and special agencies created for this purpose can serve as authorities established for governing laws in the case of expressions of folklore. The responsibilities

[19] *Expressions involved* – using the expressions of folklore themselves.

[20] *Expressions not involved* –indirect use (pl. pośrednie użytkowanie).

[21] The provisions also acknowledge the possibility of "utilization" folklore to create new artistic forms in relation to existing authorial and legal regulations. The provisions do not sanction "incidental utilization."

[22] A designation of the origin of expressions of folklore, which enables the proper identification and association of a tradition with given communities or nations must be found in all publications and materials of "public communication."

of these institutions, according to the regulations of the Model Provisions, are to include accepting and considering applications concerning the use of the expressions of folklore of a given community, and if a similar possibility has been accepted on legal grounds, specifying and collecting fees for utilizing folklore. The funds received in this way can be allocated for the development of traditional culture or can be transferred to existing funds supporting artistic activities.

The Protection of Folklore in UNESCO Activities

In international law, the concept of "intangible cultural heritage" was introduced by the regulations of the Convention for the Safeguarding of the Intangible Cultural Heritage of October 17th, 2003 which was accepted during the 32nd session of the UNESCO General Conference.[23] Article 2.2 of the Convention states that "intangible heritage" is:

a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
b) performing arts;
c) social practices, rituals and festive events;
d) knowledge and practices concerning nature and the universe;
e) traditional craftsmanship.

The Convention emphasises the efforts of the international legislator to embrace all aspects of world cultural heritage to be placed under protection. The regulation is therefore complementary in nature to the Convention for the Protection of World Cultural and Natural Heritage of 1972. Initially the debate on the shape of the new regulation concerning intangible culture was based on the 1972 Convention. The first model stipulated the creation of legal solutions for safeguarding intellectual property with elements of *sui generis* protection. The next thought was to use the existing norms of protecting tangible heritage. These proposals were not reflected in the final text of the Convention, however, a permanent financial body was called into being supported by the UNESCO Secretariat. It also created the Representative List of the Intangible Cultural Heritage of Humanity and List of Intangible Cultural Heritage in Need of Urgent Safeguarding, and required states to ensure protection for intangible cultural heritage on its territory and identification of such.[24] According to the regulations of the Convention, each state is re-

[23] Convention for the Safeguarding of the Intangible Cultural Heritage (2003).
[24] Article 11(a) and (b).

sponsible for ensuring protection for and identification of intangible cultural heritage found on its territory (Article 11(a) and (b). The Convention also states that local communities should be granted access to the process of creating descriptions of given objects. The principal authorities are subordinate to the Convention are the General Assembly of the States Parties and the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage.

In addition, four fundamental programs dedicated to the protection of intangible cultural heritage have been implemented within the framework of UNESCO: Endangered Languages, Masterpieces of the Oral and Intangible Heritage of Humanity, Living Human Treasures and Traditional World Music. In a particular way, folklore belongs to the program Masterpieces of the Oral and Intangible Heritage of Humanity. This program is strictly connected with the Convention itself as the eighth chapter of the text is dedicated to it. Objects found on this list have been incorporated in the Representative List of the Intangible Cultural Heritage. Objects to be entered on this list must meet the criteria established at the meeting in Elche, Spain in 2001, which state that, among others, an object must be of extraordinary value and must be embedded in the cultural tradition of a particular community. Such objects must also serve as a means to strengthen the feelings of identity and confirm the uniqueness of the existing cultural traditions.

Issues of Defining Subjects of Protection

A clear definition of subjects of protection is not provided in the documents of international institutions. However, categories of *equivalent* meaning may be found in literature on the subject.[25]

The diversity of solutions concerned with defining and protecting folklore introduces several fundamental ideas. In the WIPO studies, we encounter the concept of "expressions of folklore." It should be emphasised that this category also includes elements of tangible heritage (images, handicraft, sculptures and architecture) and forms of intangible culture, such as music, tales, poems, instrumental forms, musical instruments themselves, means of producing sounds and performance techniques in general. As seen in the

[25] W. Fikentscher, T. Ramsauer, „Traditionelles Wissen – Tummelplatz immaterialgüterrechtlicher Prinzipen," in: P. Ganea, C. Heath, G. Schricker (eds.), *Urheberrecht gestern, heute, morgen. Festschrift für Adolf Diet zum 65. Geburstag*, München 2001, pp. 25–41; W. Wendland, "Intellectual Property, Traditional Knowledge and Folklore: WIPO's Exploratory Program," *International Review of Industrial Property and Copyright Law* 2002, Vol. 33, No. 4.

WIPO texts, this category has been alternatively used with terms: "traditional cultural expressions" and "folklore creativity." Implementing these equal concepts generates negative connotations, which certain communities may link to the term "folklore".[26] Commercialization of the traditional art products leads not only to harmful practices of folk artists, in a material sense, but often to destroying the symbolic meaning and content of given objects. On the other hand, it is difficult to demand that the fixed idea of "folklore" becomes completely suppressed by a newer category of "traditional expressions of culture" or "expressions of folklore."

Defining the concept of intangible cultural heritage has fundamental significance, because further legal and administrational decisions depend on accepting a specific scope of protection. These decisions can influence not only the appropriate preservation of intangible cultural heritage, but also the creation of intangible cultural heritage by the government of activating and revitalizing instruments.

In 1997, the World Forum for Protecting Folklore was hosted under the auspices of UNESCO and WIPO. It was indispensable to deal with the subject of protection. The basic problem in respect to the WIPO and UNESCO publications is an attempt to determine the mutual relation of the terminology used. Undoubtedly, the most widespread category is the concept of "intangible heritage." It is a mistake, however, to identify "traditional knowledge" with "intangible cultural heritage", because the first idea, which the WIPO texts employs, is certainly narrower, and excludes elements such as language. In the most recent WIPO documents, the category of "expressions of folklore" is already treated as a separate category.[27]

Models of Protection

From the very beginning of the project to regulate the inclusion of folklore into international protocols, there emerged considerations of the possible use of intellectual property law forms in relation to traditional forms of heritage. However, is should be emphasised that folklore generally does not fulfill the basic conditions for copyright protection. The fundamental problem is the fact that according to the resolutions of the majority of national regulations

[26] Among Aboriginals, for example, this is a result of the process of appropriating traditional crafts and other forms of traditional art in favour of producing souvenirs for tourists.

[27] The Protection of Traditional Knowledge. Revised Objectives and Principles, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 8th Session, 6–10 June 2005, part III, Article 3 par. 2: WIPO/GRTKF/IC/8/5.

concerning intellectual work, the fixation of the work is the condition for protection. In respect of folklore, the fixation of the work in a tangible medium of expression and in a specific form is extremely rare. The second important issue is the term "authorship". In the copyright system, protection is intended for the author. The fundamental difference between expressions of folklore and the category of "work" according to copyright laws is the lack of a clear individual link (*viniculum spirituale*), because every representative of a given community or nation can be recognized as an author.

At present, protection of intangible culture is most often considered in reference to human rights. The Universal Declaration of Human Rights enacted by the General Assembly of the United Nations in 1948[28] also established, *inter alia*, cultural rights and the right of privacy. Registering culture and heritage into the catalogue of fundamental rights serves as an introduction of the protection of cultural heritage into the scope of basic rights of individuals and communities.[29] The Universal Declaration in Article 27(2) enacts intellectual, artistic and academic work as subjects of both property and individual rights. The resolutions of Article 17, on the other hand, define the category of *collective owners* of those rights and the concept of their "inalienability." Furthermore, the Declaration implements the principle of just remuneration for work and the principle of equality before the law. The above-mentioned resolutions can be used to ensure appropriate protection against illegal use of expressions of folklore. In addition, the Declaration enacts the right to *self-determination*, to which ethnic or national minorities can make reference when fighting to preserve their cultural identity and cultural resources. This is an important aspect, because ethnical issues associated with the protection of intangible cultural heritage were taken into consideration by an international legislator. Article 2.1. of the 2003 Convention emphasizes the participation of local communities in preserving and promoting intangible heritage. Signatory states must caution against various forms of discrimination, and in particular, political, social, and religious, which may result in decontextualization of folklore expressions. However, the question of ensuring proper development for folklore is very important so as to prevent its misappropriation by the local communities for political purposes. Also, the International Covenant on Economic, Social and Cultural Rights in 1977[30] places the responsibility of respecting the necessary freedom to conduct artistic activities on the state. In Article 15 par. 1(a), the Pact recognizes the authors' right to benefit

[28] The Universal Declaration of Human Rights (1948).

[29] A. Wojciechowska, "Uniwersalizm autorskich praw osobistych w dobie międzynarodowych konwencji," *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej* 1997, No. 69, pp. 19–25.

[30] International Covenant on Economic, Social and Cultural Rights (UN/1966).

from the protection of individual and property rights, which are a result of all forms of academic, literary and intellectual ingenuity. The main problem with using the human rights frameworks for protecting expressions of folklore is the fact that obligations ought to be abided by *the state* and not individuals or transnational corporations.

Proposals for Legal Solutions

The protection of folklore expressions by means of state law regulations or regional agreements is a difficult issue, because traditional culture does not fulfill the conditions of *authorship*, *originality* or *fixation* of intellectual work. Academic work with binding international legal solutions also does not exist. However, in relevant literature, it is possible to distinguish several proposals aiming to ensure effective protection. In his article entitled, "Rationales for the Legal Protection of Intangible Goods and Cultural Heritage,"[31] Professor Reto Hilty introduced the category of "cultural privacy," which can protect the comprehensive interests of groups, communities and states against violation of elements of intangible cultural heritage. According to Professor Hilty the rights to ownership and access to the elements of intangible heritage are part of a framework referring to human and individual rights, while employing the concept of general individual rights[32] and the idea of "privacy" taken from the copyright system.[33]

Another approach may be to introduce a structure from the French *droit d'auteur* "domain public payant," in other words, the requirement to pay a fee to specific collective management organizations when using the work after its property rights have expired. The funds collected are to be contributed to a specific purpose.[34] This type of public legal obligation could especially protect the exploitation of artistic expressions of folklore. However, introducing such a model of protection at the level of national norm-setting does

[31] R.M. Hilty, *op. cit.*, p. 893.

[32] M. Lijowska, "Koncepcja ogólnego prawa osobistości w niemieckim i polskim prawie cywilnym," *Kwartalnik Prawa Prywatnego* 2001, No. 4, p. 758.

[33] This structure, characteristic for the *common law* system is considered as an equivalent of continental unfair competition, so much that it refers not only to consumer law, but also protects the *entity*, which is injured by the unfair treatment of a third party, known as *passing off*. In literature on the subject, the fact is emphasised that the starting point here is the individual's ability to precise self-determination and a conscious feeling of threat or violation of one's rights. This judicial structure refers to the general right of property.

[34] For instance, in France these funds are allocated to the development of cultural initiatives.

not generate any of the expected results. Only the citizens of a given state will be obliged to pay for using the elements of art and traditional culture, however the access to their art and culture abroad will remain free of charge and unsanctioned. Protection of this kind can be beneficial only on the level of international systems of security.

The documents of international law reflect the concept of creating the conditions of growth for the context and grounds for development through cultural heritage based on cultural consciousness and recognizing one's own tangible and intangible heritage. Such dialogue ensures respect for diversity and the equivalence of specific forms of expressions representative of particular communities, nations and regions of the world. Intangible forms of heritage create an inseparable entirety, along with material objects which shape cultures, histories and traditions of nations and states. It should not be overlooked that issues related to protecting these objects have their own clearly exclusive economic and even commercial aspects.[35] The more frequent use of elements of intangible culture in the mass production lines of more developed states the more harm is inflicted on the interests of the developing countries, the heirs of the knowledge and traditional culture objects. It is therefore necessary to form a new *type of protection and instruments*, which would effectively safeguard the specific nature of folklore. The most effective solution seems to be intellectual property protection, but with elements of *sui generis* protection in relation to the identified and described expressions of folklore. References to human rights are also a necessary factor to understand protection in the broad sense, as closely connected with cultural identity of communities and nations.

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[35] A. Lucas-Schloetter, "Folklore," in: S. von Lewinski (ed.), *Indigenous Heritage and Intellectual Property. Genetic Resources, Traditional Knowledge and Folklore*, Alphen aan den Rijn 2008, pp. 339–501.

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